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No. 88-1072

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

STATE OF TENNESSEE, HAWKINS COUNTY, TENNESSEE, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITIONERS' RESPONSE TO THE UNITED STATES' MEMORANDUM IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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The petitioners, including the State of Tennessee and Hawkins County, Tennessee, respectfully submit the following response to the United States' memorandum in opposition to the petition for a writ of certiorari. The facts of this case are fully set forth in the petition filed with this Court on December 27, 1988. (Pet. 3-7).

The United States mistakenly characterizes the petitioners' request for a writ of certiorari as involving a "factbound question concerning the application of settled legal principles". (Memorandum 7). This petition in fact seeks review of a purely legal question, that being whether a State such as Tennessee may impose a tax on a private contractor's beneficial use of federal property and measure that tax by the value of the federal property, minus a deduction for any restricted use,

in an effort to equalize taxation of federal contractors with that of owners and other users of property in the State without violating the Supremacy Clause of the United States Constitution. This legal question regarding the method by which a State may value a private contractor's beneficial use of federal property is important not only to Tennessee but also numerous other states with similar statutes. (Pet. 12-14; Amicus Brief 2-11).

The decision of the Sixth Circuit invalidates the state use tax by labeling the statute an ad valorem tax on an interest in property. While the memorandum of the United States attempts to turn this into a "factbound" question of valuation, that quite simply is not the issue before this Court. The Sixth Circuit did not merely find Hawkin County's valuation of the beneficial use to be too high; instead it struck down the entire statutory mechanism for imposing the tax.

The petitioners submit that as long as a statutory mechanism exists to segregate a private contractor's beneficial interest in the federal property and limit the tax to that interest, then a tax levied under the statute passes constitutional muster.[1] *See e.g., United States v. County of Fresno,* 429 U.S. 452, 462-463, n.10 (1977); *Cummings v. Merchants' National Bank,* 101 U.S. 153,161 (1880); *Fell v. Armour,* 355 F. Supp. 1319, 1334 (M.D. Tenn.1972); *Kortz v. Ellingson,* 181 F.Supp. 857, 859 (D.Colo, 1960). Tenn. Code Ann. § 67-5-203(c) explicitly recognizes that the valuation of the beneficial use is subject to a deduction for any restricted use, and adequate and sufficient remedies exist for either the United States or Holston to contest the valuation of Holston's interest

[1]The United States in its opposing memorandum concedes that "to measure the value of beneficial use according to the value of the underlying property, subject to a deduction for restricted use" is valid. (Memorandum 7).

under Tenn. Code Ann. § 67-5-203(c). In fact, Holston has pursued these remedies by filing an appeal of Hawkins County's assessment to the Tennessee State Board of Equalization pursuant to Tenn. Code Ann. § 67-5-1501. (Pet. 6).

The United States' assertion on page 7 of its memorandum that the "value of Holston's [the cost-plus contractor] use of the plant obviously should not exceed it management fixed fee, which is 3.8 million dollars in 1986", not only fails to recognize the specific interest that is being taxed under Tennessee's statute, but also overlooks significant benefits that are conferred upon the private contractor in addition to its annual fee. Tenn. Code Ann. §67-5-203(c) levies a tax upon the private contractor Holston's beneficial use of federally owned real and personal property at the Holston Army Ammunition Plant. Holston utilizes literally hundreds of buildings located in the Holston Plant as well as federally owned equipment, all supplied rent free to it by the United States. (Pet. 3). The use of this property is essential to Holston's obtaining the significant benefits gained from its contract with the United States, and these benefits are not limited to the annual fee received by Holston. The fee represents only the guaranteed profit Holston gains from its activities at the Plant. Holston also receives reimbursement of virtually all costs incurred by it in meeting the requirements of its contract with the United States, which costs totaled $380,990,908.00 from the years of 1979-1985 or about $63,500,000.00 per year. Holston also occupies and utilizes the vast facilities located at the Plant cost-free in order to meet its production schedules for the United States, and indeed without the use of this property Holston could not comply with the terms of its contract.

The United States' circuitous argument that Tennessee's placement of this beneficial use tax in Chapter 5 of Title 67, which pertains to property taxes, necessarily causes Tenn. Code Ann. § 67-5-203(c) to be an unconstitutional tax on pro-

perty owned by the United States is totally without merit. Once again, the United States is relying upon "manipulation and wooden formalism" to improperly limit the full range of the State's taxing authority. *See United States v. New Mexico*, 455 U.S. 720, 735-737 (1982). Tenn. Code Ann. § 67-5-203(c) was placed among the property tax provisions of the Code because the use tax it imposes is designed to place federal contractors in the same economic posture as state and local goverments and charitable institutions which can be subjected to property taxes. That the statute compensates for a property tax does not show it taxes the property of the United States. As this Court has recognized, the mere fact that the legal incidence of the tax differs does not in and of itself constitute unlawful discrimination. *Washington v. United States*, 460 U.S. 536, 538-544 (1983).[2]

This Court has previously approved methods of taxing beneficial use that are similar to Tennessee's. Since the Sixth Circuit decision is incongruous with those precedents, review is appropriate here to clarify the mechanism under which use of federal property by a cost-plus contractor may be taxed by a state.

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[2]The Sixth Circuit did not reach the United States other attacks on Tenn. Code Ann. § 67-5-203(c), and the Petitioners disagree with the United States unsupported allegation in its memorandum that these arguments have any basis. (memorandum 7 n.3) The Petitioners are certainly willing to address these issues if this Court so wishes, but they are not presently before this Court.

CONCLUSION

For these reasons and the reasons set forth in the petition and in the amicus brief which several states have filed with this Court, the Petitioners submit that since the opinion of the Sixth Circuit conflicts with longstanding precedents of this Court and will substantially affect the taxing powers of the states, a writ of certiorari should issue to review the decisions below.

Respectfully submitted,

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